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Cambridge Telephone Company C-R Telephone Company El Paso Telephone Company Geneseo Telephone Company Henry County Telephone Company Mid Century Telephone Cooperative, Inc. Reynolds Telephone Company Metamora Telephone Company Harrisonville Telephone Company Marseilles Telephone Company Viola Home Telephone Company
050259, 050260, 050261, 050262, 050263, 050264, 050265, 050270, 050275, 050277, 050298 (Cons.)

FROM: John D. Albers, Administrative Law Judge

Petitions for Declaratory Relief and/or Suspension or Modification Relating to Certain Duties under Sections 251(b) and (c) of the Federal Telecommunications Act, pursuant to Section 251(f)(2) of that Act; and for any other necessary or appropriate relief.

RECOMMENDATION: Rescind the July 13, 2005 Order (and July 19, 2005 Amendatory Order) and adopt the Post Exceptions Proposed Order or, in the alternative, Grant rehearing to examine Sprint's contracting practices.

Illinois Commerce Commission
August 23, 2005

The Commission

On July 13 and 19, 2005, the Commission entered an Order and an Amendatory Order, respectively, in these consolidated dockets. In the Order the Commission concluded that Sprint is a telecommunications carrier, as that term is defined in the federal Telecommunications Act of 1996 ("Federal Act"), and that therefore the eleven petitioning rural incumbent local exchange carriers ("ILEC") must negotiate terms for interconnection with Sprint. In reaching this conclusion, the Commission also found that Sprint indiscriminately makes its services available to cable television operators.

On August 5, 2005, seven of the eleven rural ILECs (Cambridge Telephone Company, C-R Telephone Company, El Paso Telephone Company, Geneseo Telephone Company, Henry County Telephone Company, Mid-Century Telephone Cooperative, Inc., and Reynolds Telephone Company) (collectively "the 7 ILECs") filed a Petition for Reconsideration. On August 11, 2005, Viola Home Telephone Company ("Viola") filed an Application for Rehearing and Reconsideration pursuant to Section 10-113 of the Public Utilities Act ("Act"). In addition to the points raised in its filing, Viola adopts the arguments and objections made by the 7 ILECs in their August 5 filing. On August 12, 2005, the three remaining rural ILECs (Metamora Telephone Company, Harrisonville Telephone Company, and Marseilles Telephone Company) (collectively "the 3 ILECs") filed an Application for Reconsideration and Rehearing pursuant to Section 10-113 of the Act and Section 200.880. In addition to making other arguments, the 3 ILECs also adopt the arguments set forth by the 7 ILECs in their August 5 filing. Also on August 12, 2005, Sprint filed a response in opposition to the 7 ILECs' August 5 application for rehearing. Such a response by Sprint is not provided for in the Commission's rules.

All of the ILECs request that the Commission reconsider its conclusions and

declare that Sprint is not acting as a telecommunications carrier in the service it proposes to provide and that therefore they have no obligation to negotiate interconnection with Sprint. Alternatively, they seek rehearing to submit evidence on Sprint's contracting practices--which they contend are neither indiscriminate nor indifferent. The ILECs assert that the Commission raised this issue in its Order.

In support of their request, the rural ILECs continue to maintain that the core issue remains that Sprint, in the services it proposes to provide to MCC Telephony of Illinois, Inc. ("MCC"), is not acting as a telecommunications carrier within the meaning of the Federal Act. The rural ILECs argue that the Commission's conclusions contradict the conclusions of the D. C. Court of Appeals in *Virgin Islands Telephone Corp. v. Federal Communications Commission*, 198 F.3d 921 (1999), which controls the issues in these consolidated dockets. Specifically, the Commission's reliance on the service that MCC provides to the public as a basis for concluding that Sprint is acting as a telecommunications carrier is flawed, according to the rural ILECs. They point out that such a review of a customer's customers was rejected in *Virgin Islands Telephone*.

The rural ILECs also contend that there is no basis in the record for the Commission's conclusion that Sprint is selling services to MCC and other cable television providers "indiscriminately" and "indifferently." In its Order, the Commission noted that to be considered a common carrier/telecommunications carrier, an entity must meet a two-pronged test as set forth in *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 525 F.2d 630 (D.C. Cir. 1976). The first prong requires the entity to serve all potential users indifferently. The rural ILECs observe that the unrefuted record evidence shows that Sprint intends to do the opposite. They state further that the record shows that Sprint makes such individualized decisions using confidential and proprietary individual agreements, contrary to Section 13-501 of the Public Utilities Act. Section 13-501 requires a telecommunications carrier to provide its services through tariffs. Because the Commission raised Sprint's contracting practices in its Order without giving the parties any opportunity to address it, the rural ILECs claim that their due process rights to present evidence have been violated. For this reason alone, the rural ILECs argue that the Commission should grant rehearing and allow them to gather and submit evidence about Sprint's actual contracting practices.

Viola also states that the Commission has failed to consider the public confusion its Order will entail. All local exchange carriers must follow the Commission's rules with regard to local service including 83 Ill. Admin. Code Parts 730, 732, and 735. Since MCC will perform marketing, sales, and billing, Viola states that customers will be led to believe that their local exchange carrier is MCC, but, because Sprint will do the switching, it is unclear whether Sprint or MCC is the competitive local exchange carrier for purposes of 251(a) and (b) or local exchange carrier for purposes of Parts 730, 732, and 735.

Viola and the 3 ILECs argue further that the Commission erred in assuming that Sprint's internet protocol ("IP") enabled services are telecommunications services or are local exchange service. They contend that Sprint's services are entirely interstate in nature, and the Commission has no jurisdiction over interstate matters beyond that set forth in Section 252 of the Federal Act. Furthermore, because the question of the proper classification of voice over IP ("VoIP") and IP enabled services as either telecommunications services or information services is filled with regulatory uncertainty, they insist that they should not be required to arbitrate with Sprint while this issue is unresolved by the Federal Communications

Commission ("FCC").

The 3 ILECs also state, however, that notwithstanding Sprint's position on this matter, VoIP or IP enabled services should properly be classified as "information services" under the Federal Act. The 3 ILECs assert that the only court to speak on the question has so held, and that court's decision was affirmed on appeal on other grounds after the entry of the Vonage Order. The 3 ILECs contend that "information services" are not "telecommunications traffic" under Section 51.701(b)(1) of the FCC's rules, and therefore they are not subject to reciprocal compensation under Section 251(b)(5).

In addition, the 3 ILECs expend considerable effort discussing how the July 13 Order reflects procedural errors, constitutes an abuse of discretion, and is not based on record evidence. Specifically, because the July 13 Order contains factual assertions that are in question (regarding the nature of Sprint's service offerings), the 3 ILECs believe that a hearing should have been held. The 3 ILECs also question whether the Sprint affidavits relied upon by the Commission were part of the record.

I continue to believe that the *Virgin Islands Telephone* decision supports the rural ILECs' contention that Sprint is not acting as a telecommunications carrier in these circumstances and therefore recommend that the Commission rescind its July 13, 2005 Order (and July 19, 2005 Amendatory Order) and adopt the Post-Exceptions Proposed Order. As for the ILECs' alternative request, they are correct that Sprint has admitted that the terms it offers to various cable television operators can vary based on specific business conditions and therefore are arguably not offered indiscriminately or indifferently. The rural ILECs should be given the opportunity to address Sprint's contracting practices. Accordingly, rehearing should be granted to examine Sprint's contracting practices if the Post-Exceptions Proposed Order is not adopted. The deadline for Commission action is August 25, 2005. If the Commission grants rehearing, the deadline on the rehearing would be on or about January 20, 2006, well after the deadlines in the four pending arbitration dockets concerning Sprint's interconnection with smaller ILECs. The four dockets are Docket Nos. 05-0402/05-0433 (Consolidated), 05-0443, and 05-0470.

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BEFORE THE

SOUTH CAROLINA PUBLIC SERVICE COMMISSION

DOCKET NO. 2005-67-C – ORDER NO. 2005-

SEPTEMBER 8, 2005

In Re: Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Farmers Telephone Cooperative, Inc., Home Telephone Co., Inc., PBT Telecom, Inc., and Hargray Telephone Company, Concerning Interconnection and Resale under the Telecommunications Act of 1996	)	ORDER ON ARBITRATION

I. INTRODUCTION

This matter comes before the South Carolina Public Service Commission ("Commission") on the Petition of MCImetro Access Transmission Services, LLC ("MCI") for arbitration to establish interconnection agreements with Farmers Telephone Cooperative, Inc., Hargray Telephone Company, Home Telephone Co., Inc., and PBT Telecom, Inc. (collectively, "the RLECs"), pursuant to Section 252(b) of the Telecommunications Act of 1996 ("Act"). In its petition, MCI initially raised twenty-one issues. Several issues were resolved before hearing, which was held on June 13 and 14, 2005. The ten remaining issues, including subparts, are grouped into four subject areas and represent the disputed terms and conditions of the parties' interconnection agreements.

On or about October 8, 2004 MCI made a bona fide request for interconnection o the RLECs pursuant to section 252(a) of the Act. Pursuant to Section 252(b)(1), MCI

could bring a petition for arbitration of outstanding issues during the period from the 135th day to the 160th day after October 8, 2004. MCI timely filed its petition on or about March 17, 2005. The RLECs, having consented to a joint arbitration, filed a return to the petition on April 11, 2005. Pursuant to section 252(b)(4)(C) of the Act, the Commission has nine months to resolve the matters raised in the petition; however, the parties consented to and the Commission granted an extension of that period, to September 8, 2005. Upon the filing of the petition and return, the Commission established a schedule and procedures for arbitration, including the appointing of a pre-hearing officer. The parties filed testimony and a joint issues matrix setting forth the outstanding issues to be arbitrated by the Commission.

MCI presented the pre-filed direct and rebuttal testimony of Greg Darnell, Senior Manager, Regulatory Economics for MCI. The RLECs presented the pre-filed direct and surrebuttal testimony of Douglas D. Meredith, and the pre-filed direct testimony of Valerie Wimer. Both of those individuals are employees of John Staurulakis, Inc., a consultant for the RLECs.

II. LEGAL STANDARDS AND PROCESSES FOR ARBITRATION UNDER THE ACT

The Act provides that parties negotiating an interconnection agreement have the duty to negotiate in good faith. After negotiations have continued for a specified period, section 251(b)(2) of the Act allows either party to petition the Commission for arbitration of unresolved issues. Through the arbitration process, the Commission must now resolve the remaining disputed issues in the manner required by sections 251 and 252 of the Act.

The parties will incorporate the Commission's decision into a final agreement that will then be submitted for approval pursuant to section 252(c) of the Act.

III. FINDINGS OF FACT

1. MCI is a limited liability company organized and formed under the laws of the State of Delaware. MCI is authorized by this Commission to provide local exchange service in South Carolina. MCI is, and at all relevant times has been, a "local exchange carrier" and a "competing local exchange carrier" ("CLEC") under the Act.

2. Each of the RLECs is a corporation organized and formed under the laws of the State of South Carolina. The business address for each ILEC, according to the South Carolina Secretary of State's office, is located as follows: Farmers Telephone Cooperative, Inc.: Registered Agent: J.L. McDaniel, 1101 E. Main Street, Kingstree, South Carolina 29556; Hargray Telephone Company, Inc.: Registered Agent: L.E. Harney, Hardeeville, South Carolina; Home Telephone Company, Inc.: Registered Agent: Robert L. Helmby, 322 Main, Moncks Corner, South Carolina; PBT Telecom, Inc.: Registered Agent: L. Stephen Coffield, 330 E. Black Street, Rock Hill, South Carolina, 29730-9414. Each of the RLECs is authorized to provide local exchange and other services within its franchised areas in South Carolina. Each RLEC is an "incumbent local exchange carrier" ("ILEC") under the terms of the Act.

3. MCI has switches in Atlanta, Georgia and in Charlotte, North Carolina, respectively, which it proposes to use for interconnect with the RLECs.

4. MCI and the RLECs began negotiations for an interconnection agreement with each RLEC, but were unable to finalize all the terms thereof. Thus this Commission was requested to arbitrate the unresolved terms of the interconnection agreements.

IV. CONCLUSIONS OF LAW

A. GENERAL

5. This arbitration is being conducted pursuant to Section 252 of the Act. Pursuant to Section 252(b)(4)(A) of the Act, we limit our consideration to the remaining issues set forth in the petition and the return.

The appropriate legal standard to be applied in this case is as stated in Sections 252(c) and 252(d)(2) of the Act.

B. UNRESOLVED ISSUES

The remaining issues to be resolved by this Commission have been grouped by the parties as follows:

Issues #6, #10(a), #15, #17 involve whether the services provided by MCI are to be limited to those services provided "directly" to MCI's "end user" customers, and whether the traffic to be exchanged under the interconnection agreements is to be limited to traffic to and from the parties' "end user" customers.

Issues #8, #10(B), #13 concern whether MCI may receive compensation pursuant to the FCC's *ISP Remand Order*[1] for calls bound to internet service providers ("ISPs") using "virtual" NXX[2] codes.

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[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 F.C.C.R. 9151, CC Docket No. 96-98, Order on Remand and Report and Order, FCC 01-131, 2001 WL 455869 (F.C.C.), 16 F.C.C.R. 9151, 16

Issue #21 asks whether MCI may receive compensation for ISP-bound traffic at the rate of $.0007 per minute.

Issues #3, #14 and #16 concern whether MCI should be required to use Jurisdictional Indicator Parameter ("JIP") as a signaling parameter.

These four groups of issues are discussed below.

I. Serving Customers Directly vs. Indirectly - (Issues 6, 10(a), 15, 17)

Issue #6: Should End User Customer be defined as only the End User directly served by the Parties to the contract? (General Terms & Conditions, Glossary, §2.17).

MCI's Position: No. End User Customers may be directly or indirectly served. The Act expressly permits either direct or indirect service. (See Issue 10(a)).

RLECs' Position: Yes. This agreement is limited in scope to the intraLATA traffic exchanged between customers directly served by one party and the customers directly served by the other party. Other carriers that provide local exchange services to customers and wish to exchange traffic with the RLECs must establish their own interconnection or traffic exchange agreements with the RLECs.

Issue #10(a): Should MCI have to provide service a) only directly to end users, and b) only to End Users physically located in the same LATA to be covered by this agreement? (Interconnection, §1.1)

MCI's Position: No. End User Customers may also be indirectly served by the Parties through resale arrangements. The Act requires both Parties to the contract to allow resale. The same "directly or indirectly" language is used in section 2.22 of ITCs' model contract for defining interexchange customers. The ILECs thus do not attempt to limit

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FCC Rcd. 9151 (rel. April 27, 2001), remanded but not vacated, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[2] NXX codes are comprised of the fourth through the sixth digits of a ten digit telephone number. These codes are used to identify rate centers. "Virtual" NXX allows a customer to obtain a telephone number in a local calling area in which the customer is not physically located. As far as the person calling the number may be concerned, the call is local; however, the person answering the call is actually located physically somewhere else in the LATA. Virtual NXX is similar to "foreign exchange" ("FX"), although there are some technical differences between them. *In re: Petition of Adelphia Business Solutions of South Carolina, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Docket No. 2000-516-C, Order on Arbitration, Order No. 2001-045 (January 16, 2001), pp. 4-5 ("*Adelphia*"). ILECs also use virtual NXX codes. T. 346.

the resale ability of IXCs, and there is no reason why they should try to do so regarding *local exchange.*

RLECs' Position: For purposes of this agreement, yes. The traffic governed by this agreement is for telecommunications service provided by either Party to end user customers and not for service provided by MCI to a third party as a private carrier.

Issue #15: Does the contract need this limit of "directly provided" when other provisions discuss transit traffic, and the issue of providing service directly to end users also is debated elsewhere? (Interconnection, §3.1)

MCI Position: No. This language is unnecessary and confusing in light of other provisions of the contract.

RLECs' Position: Yes. As discussed in Issues 6 and 10(a), third party traffic is not part of this agreement between the RLECs and MCI.

Issue #17: Should the Parties be providing service directly to End Users to port numbers? (Local Number Portability, §1.1)

MCI Position: No. This is not required for any industry definition of LNP. MCI is certified to do LNP for the End Users that indirectly or directly are on its network. Concerns that some resellers may not be telecommunications carriers or must provide the same type telecommunications services provided prior to the port is an illegal limit on what entities MCI can provide wholesale telecommunications services. The FCC has even allowed IP-Enabled (VoIP) service providers to obtain numbers directly without state certification See the FCC's CC Docket 99-200 order (Adopted: January 28, 2005 Released: February 1, 2005) granting SBC Internet Services, Inc. (SBCIS) a waiver of section 52.15(g)(2)(i) of the Commission's rules. And MCI knows no law requiring that the same type of Telecommunications Service provided prior to the port has to be provided. That is antithetical to the goals of competition.

RLECs' Position: Yes. The current FCC rules require only service provider portability. The RLEC language proposed in the agreement is consistent with the RLEC obligations and the FCC's rules regarding number portability.

Discussion:

MCI seeks to provide telecommunications services to Time Warner Cable Information Systems, Inc. ("TWCIS"), and to pass traffic to the RLECs in standard public-switched telephone network ("PSTN") format that originates with TWCIS. T. 218, 230. Because TWCIS needs to reach premises not served by its network and

provide E911 (i.e., access via the PSTN to public safety answering points) for its customers, MCI requests interconnection. T. 122. In addition to interconnection and E911, MCI would provide TWCIS with circuit switching, transport, number portability and directory assistance.

Although initially contending that they have no obligation to interconnect with MCI if the latter seeks to provide services to a "third party" that is not an "end user," i.e., TWCIS, the RLECs apparently now concede that 47 U.S.C. §251(a) requires them to interconnect with MCI for its provision of services to TWCIS. See T. 223. The RLECs, however, continue to contend that they are not required to *exchange* traffic with MCI, by virtue of 47 U.S.C. §251(b), if MCI is seeking to pass traffic that originates with another carrier, and, in particular, originates as voice-over-internet protocol ("VoIP"). The RLECs, however, nowhere point to any statute, rule or order that specifically and expressly justifies a refusal to interconnect so that MCI may provide these services and exchange such traffic, or that would justify insistence on a requirement under the agreement that MCI's services be limited to those provided "directly" to an "end user," or that the traffic exchanged between the parties should be limited to that provided to "end users" of the parties.

There is no question that TWCIS originates calls in internet protocol ("IP").[3] T. 123-24, 232. The fact, however, that MCI seeks to exchange traffic that originates in IP,

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[3] There also is no question that the FCC has jurisdiction over VoIP. During 2004 the FCC issued three major orders on the classification of IP-enabled services. In the first case, the FCC ruled that Pulver.com's Free World Dialup service, which is a computer-to-computer service, is an "unregulated interstate information service." *In the Matter of Petition o Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27, 2004 WL 315259 (F.C.C.), 19 F.C.C.R. 3307, 19 FCC Rcd. 3307, 31 Communications Reg. (P&F) 1341 (rel. February 19, 2004). Next, the FCC denied AT&T's request for a declaratory ruling that access charges do not apply to its "phone-to-phone" IP telephony

or that such calls may be "information service" (and we express no opinion with regard to *that subject) furnishes no basis upon which to deny interconnection.* 47 C.F.R. §51.100 provides:

> A telecommunication carrier that has interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well.

The fact that some IP-originated traffic may be provided "through the same arrangement" does not excuse the RLECs from interconnecting for the purposes MCI intends. T. 181-82.

Moreover, section 251(b) of the Act refers to obligations of local exchange carriers, including the exchange of traffic with other local exchange carriers, and, contrary to the RLECs' contentions, does not indicate that the obligation to interconnect does not apply if a contracting carrier seeks to provide services to carrier customers. T.

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service, which employs VoIP transport to connect two users on the circuit-switched PSTN. *In The Matter Of Petition For Declaratory Ruling That AT&T's Phone-To-Phone IP Telephony Services Are Exempt From Access Charges*, WC Docket No. 02-361, Order, FCC 04-97, 2004 WL 856557 (F.C.C.), 19 F.C.C.R. 7457, 19 FCC Rcd. 7457, 32 Communications Reg. (P&F) 340 (rel. April 21, 2004). Subsequently, the FCC preempted the Minnesota Public Utilities Commission and other state commissions from regulating services like Vonage's DigitalVoice Service, which is an IP-PSTN or PSTN-IP service. *In the Matter of Vonage Holdings Corporation Petition for Declaratory Relief Concerning an Order of the Minnesota Public Utilities Commission,* WC Docket 03-211, Memorandum Opinion and Order, FCC 04-267, 2004 WL 2601194 (F.C.C.), 19 F.C.C.R. 22,404, 19 FCC Rcd. 22,404, 34 Communications Reg. (P&F) 442 (rel. November 12, 2004). The FCC, however, referred the question whether such similar IP-enabled services should be classified as unregulated "information services" or regulated "telecommunications," to its IP-Enabled Services proceeding (WC Docket No. 04-36, referred to *supra*). The decision on those issues in that proceeding has not yet issued. Also, the FCC did not state in its *Vonage* decision what this type of traffic is (i.e., "telecommunications services" or "information services"), or that jurisdiction would be determined by the physical location of the customer. The issue whether cable modems are an "interstate information service", or whether cable modem service is a "telecommunications service" or has a "telecommunications component," was recently decided by the U.S. Supreme Court in the *Brand X* case. *National Cable & Telecommunications Assoc. v. Brand X Internet Services, et al*, 545 U.S. ___, 125 S.Ct. 2688, 05 Daily Journal D.A.R. 7749, 18 Fla. L. Weekly Fed. S 482, 05 Cal. Daily Op. Serv. 5631, 36 Communications Reg. (P&F) 173, 73 USLW 4659 (June 27, 2005). T. 135.

180-82. The *Atlas* decision,[4] which the RLECs cite as authority for their position, is inapposite. See T. 242-43. In that case, a sham entity was created to terminate long distance calls, while charging high access charges. Neither local exchange traffic nor compensation for terminating local traffic was involved. The sham entity had one customer, a "chat room." Nothing in *Atlas* requires a "direct contractual relationship" between the RLECs and TWCIS.

The RLECs cite paragraph 1034 of the Local Competition Order.[5] That order, however, in discussing reciprocal compensation, "in which two carriers collaborate to complete a local call," does not state or imply that two carriers cannot collaborate to complete a local call that originates on a third party's network, or that carriers are limited in what types of customers they serve. The RLECs also cite 47 C.F.R. §51.701(e), which refers to compensation paid by one carrier to another carrier "for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier." Nothing in the rule, however, limits its application to traffic "directly" generated by the interconnecting carrier's customers. Indeed, the term "telecommunications traffic that originates on the network facilities of the other carrier" does not, as the RLECs imply, exclude an obligation to interconnect for the purpose of exchanging traffic that originates as IP. Moreover, "telecommunications traffic" is not defined by the FCC's regulations.

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[4] *In the Matter of Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc., v. AT&T Corp.*, File No. E-97-003, 16 F.C.C.R. 5726, Memorandum Opinion and Order, FCC01-84 (rel. March 13, 2001).

[5] *In The Matter Of Implementation Of The Local Competition Provisions In the Telecommunications Act Of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98, 95-185, First Report and Order, FCC 96-325, 1996 WL 452885 (F.C.C.), 11 F.C.C.R. 15,499, 11 FCC Rcd. 15,499, 4 Communications Reg. (P&F) 1, ¶ 154.

"Telecommunications," however, *is* defined, and "means the transmission, between or *among points specified by the user, of information of the user's choosing, without change* in the form or content of the information as sent and received." 47 U.S.C. §153(43). There will be no change to the "form or content of the information" to be sent by MCI to the RLECs, or when information is received by MCI from the RLECs. T. 183.

Moreover, as the RLECs admit, the Act does not limit the purpose of interconnection to providing services "directly" to "end users." T. 37, 235. The Act does not even employ the term "end users;" instead, the term employed is "users." For example, 47 C.F.R. §52.21(q) applies to the "ability of users of telecommunications services" to port numbers; significantly, the reference in the rule is to "users," not "end users." The term "users" as employed by the Act is broad, and includes "users" like TWCIS, as one sees from the phrase in 47 U.S.C. §153 (46), "or to such classes of users as to be effectively available".

Therefore, although much attention has focused on the nature of the traffic as originated with TWCIS, the question, if interconnection can be lawfully limited in any respect, is what services *MCI* seeks to provide and to exchange with the RLECs. Those services are classic "telecommunications services." 47 U.S.C. §153 (46) states:

> The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

TWCIS, like other users of telecommunications, including business, individual and governmental users, is a member of "the public." Moreover, by making telecommunications available to TWCIS, which will then use those services to provide

services to its end users, MCI is undeniably providing telecommunications "to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

Further, the services to be provided by MCI under the agreement are not limited to those for the benefit of TWCIS. This is not an instance in which MCI seeks interconnection to provide services solely for any customer. MCI's contract with TWCIS is no different from the individually-negotiated contracts that carriers have with other customers. MCI would like to offer its services to others. MCI also seeks to serve end user customers "directly" as well, including its ISP customers. T. 185, 220-21.

Failing, then, to find that the Act *prohibits* interconnection for the purpose of providing services to another carrier, the RLECs attempt to turn the Act on its head, and contend that there is no specific authority therein for MCI *to* interconnect for the purpose of providing services to another carrier. But the fact that MCI seeks to provide services for another carrier, i.e., TWCIS, does not prevent MCI's interconnection with the RLECs. If it did, no carrier could interconnect for the purpose of providing, for example, wholesale services to other carriers, or to provide a transiting function, or to provide exchange access. T. 57-58, 161, 181-82, 219, 227, 241. These are services for which interconnection is permitted under the Act. T. 58.

Such "indirect" service arrangements are not only authorized under the Act, but are necessary for network engineering; otherwise, each local exchange carrier would have to connect with every other local exchange carrier. T. 121, 125. Such a requirement of "direct" interconnection would be not only impracticable, it would significantly drive up the costs of entry, frustrate Congress' intent to reduce entry barriers, and hamper rather

than facilitate local competition. The Act was enacted to "provide for a pro-competitive, *de-regulatory national policy framework*" by "opening all telecommunications markets to competition." Accordingly, the RLECs' attempt to restrict interconnection traffic to only that from end users of the interconnecting parties is not sustainable under policy or law. T. 186, 219.

In recent cases before the Ohio, New York and Illinois utilities commissions, arguments similar to those of the RLECs have been utterly rejected. Rural ILECs in Ohio unsuccessfully contended that MCI did not meet the requirements of section 153 of the Act because MCI was not offering services "directly" to the public. The Ohio Public Utilities Commission declared:

> 47 U.S.C. [paragraph] 153(a) (1) and (c) (2) require [the ILECs] to interconnect with other 'telecommunications carriers' and that 47 U.S.C [para] 153 defines a 'telecommunications carrier' as 'any provider of telecommunications services.' The Commission also observes, as do [the ILECs], that the 47 U.S.C. [para] 153 definition of 'telecommunications service,' is 'the offering of telecommunications for a fee directly to the public, or to classes of users as to be effectively available to the public, regardless of facilities used.' Applying this definition to MCI and its [bona fide request to interconnect], the Commission notes that MCI will doubtless collect a fee for providing telecommunications via interconnection with [the ILECs]. Further, MCI's arrangement with Time Warner will make the interconnection and services that MCI negotiates with [the ILECs] 'effectively available to the public, regardless of the facilities used.'[6]

Likewise, the New York Public Service Commission rejected the same arguments raised by the RLECs. In that case ILECs argued that section 251(b) of the Act does not require them to interconnect with Sprint, which had entered into a business arrangement with TWCIS to offer voice service in competition with the ILECs. The ILECs similarly attempted to limit the definition of "end user" to only the end users of Sprint. As in the

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[6] Order on Rehearing, *In the Matter of the Application and Petition in Accordance with Section II.A.2.b of the Local Service Guidelines Filed by: The Champaign Telephone Co., Telephone Services Co., The Germantown Independent Telephone CO, and Doylestown Telephone Co.*, ¶15, p. 13 (April 13, 2005).

Ohio decision, the New York commission found that Sprint's agreement to provide TWCIS with interconnection, number portability, order submission, E911 and directory assistance, among other services, meets the definition of "telecommunications services:"

> While Sprint may act as an intermediary in terminating traffic within and across networks, the function that Sprint performs is no different than that performed by other competitive local exchange carriers with networks that are connected to the independents. Sprint meets the definition of "telecommunications carrier" and, therefore, is entitled to interconnect with the independents pursuant to section 251(a). We find unpersuasive the independents' claim that their section 251(b) duties as local exchange carriers are not triggered because Sprint is not an ultimate provider of end user services.[7]

Last month the Illinois Commerce Commission rejected the hearing officer's recommendation upon which RLECs relied in their pre-filed testimony. The Illinois commission's decision[8] concerned Sprint's efforts to interconnect with rural ILECs, to provide services to the affiliate of a cable provider. Sprint's services are similar to those provided by MCI to TWCIS. Arguing that Sprint is not providing telecommunications services and is not a "common carrier,"[9] the ILECs contended that Sprint was a "private carrier" that, under the *Virgin Islands Telephone* case,[10] is not entitled to interconnection.

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7 *Petition of Sprint Communications Company L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Independent Companies*, Case 05-C-0170, Order Resolving Arbitration Issues, p. 5 (May 18, 2005). T. 184-85.

8 *Cambridge Telephone Company, et al, Petitions for Declaratory Relief and/or Suspension or Modification Relating to Certain Duties under Sections 251(b) and (c) of the Federal Telecommunications Act, pursuant to Section 251(f)(2) of that Act; and for any other necessary or appropriate relief*, 05-0259, etc., Order (July 13, 2005).

9 47 U.S.C. 153 (10) states:

> The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

10 *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

The Illinois commission, however, found that Sprint "does indiscriminately offer its services to a class of users so as to be effectively available to the public."[11] The Illinois commission also found that Sprint does not alter the content of voice communications by end users. Significantly, the Illinois commission also rejected the analysis of the Iowa Utilities Board,[12] upon which the RLECs rely. For all these reasons, the proposed language of MCI is adopted by the Commission, and the proposed language of the RLECs is rejected.

Specifically with regard to porting (issue #17), MCI has been able to reach negotiated agreements with many other independent ILECs regarding MCI's proposed number portability language. There is no legitimate reason why MCI's proposed language is not reasonable in this case as well. T. 187. Here, however, the RLECs seek to impose several conditions, none of which is justified by law or policy:

First, the RLECs want to restrict porting to the "same type of" service that the end user (whose number is being ported) previously had; i.e., "telecommunications services." T. 245. The RLECs, however, are not prepared to say that what TWCIS originates is *not* telecommunications services, see T. 260, and Hargray's affiliate's VoIP necessarily must rely on ported numbers, which, presumably, the affiliate obtains from Hargray. T. 73. Not only is the restriction urged by the RLECs not found in the Act; the RLECs contradict themselves by admitting that, for example, wireline to wireless porting is acceptable. T. 245. Moreover, whether or not a TWCIS end user receives

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11 *Cambridge Telephone Company, et al, supra*, at p. 12.

12 *In re Arbitration of Sprint Communications Company, L.P. v. Ace Communications Group, et al.*, Docket no. arb-05-2, Order Granting Motions to Dismiss, (May 26, 2005)

"telecommunications service" from TWCIS is a question within the FCC's jurisdiction. It is not within the Commission's jurisdiction to conclude that TWCIS does not offer telecommunications service. Thus the premise upon which the RLECs base their argument is flawed.

Second, the RLECs want to restrict the use of the ported number to the same location. Ironically, the way Hargray's affiliate provides its VoIP service violates this criterion, since its numbers are not associated with the pre-port location, but may become "mobile." T. 60. Further, although the RLEC's second criterion is not found in the Act, because of the manner in which MCI and TWCIS engage in number portability the same end user will retain the number both before and after the port and he or she will be in the same location before and after the port. See T. 244.

Third, the RLECs question whether MCI or TWCIS would port numbers to other carriers. This statement is irrelevant as well as inaccurate. MCI, as is the case with any *interconnecting* carrier, is obligated to provide dialing parity and local number portability. The latter applies when, for example, a TWCIS end user's telephone number is ported to the RLECs. The systems used by the industry, including by MCI (for TWCIS), are not dependent on any such release of the number by the current or "losing" provider of service, and MCI (for TWCIS) would not prevent the end user from moving to another provider. T. 188.

Finally, the RLECs also suggest that "the end user must be switching from a telecommunications carrier to another telecommunications carrier." In this regard, and as discussed above, MCI *is* a telecommunications carrier, and the end user is switching

telecommunications service from one telecommunications carrier to another *telecommunications carrier (i.e. from the RLEC to MCI).*

Therefore, there are no applicable restrictions on MCI that would block it from issuing orders to port numbers under current industry standards. Accordingly, the Commission accepts MCI's proposed language with regard to this group of issues. T. 127-30, 244.

II. ISP-Bound Traffic/Virtual NXX – (Issues 8, 10(b), 13)

Issue #8: Is ISP traffic in the SC or FCC's jurisdiction in terms of determining compensation when FX or virtual NXX service is subscribed to by the ISP? (General Terms & Conditions, Glossary, §§2.25, 2.28, 2.34)

MCI Position: See Issue No. 10 (b). ISP traffic is in the FCC's jurisdiction and subject to reciprocal compensation treatment pursuant to its ISP Remand Order as amended by the CoreCom decision. The Texas PUC recently clarified that its order applying access charges to CLEC FX traffic only applied to non-ISP traffic and that the FCC's ISP Remand order applies to ISP traffic. While MCI believes that it is discriminatory to allow ILECs to rate their FX and virtual NXX traffic as local when CLECs are not allowed to do the same, it will not litigate this issue, as concerns the ITCs, for non-ISP traffic in light of the Commission's previous decisions. However, MCI reserves the right to have its FX and virtual NXX services rated as local if the FCC preempts the subset of states that have inconsistent rulings on the rating of CLEC FX or virtual NXX services.

RLECs' Position: The issue in dispute between the RLECs and MCI is not, as MCI suggests, whether ISP-Bound traffic is in the jurisdiction of the South Carolina Commission or the FCC. The issue is what constitutes ISP-bound traffic, especially when the CLEC assigns a virtual NXX as a dial-up ISP number and the ISP is not physically located in the RLEC's local calling area. Under the RLECs' proposed language all types of interexchange calls, including dial-up ISP calls using a virtual NXX, are to be treated consistent with the Commission's and the FCC's existing rules which exclude all such calls from reciprocal compensation and ISP intercarrier compensation.

Issue #10(b): Should MCI have to provide service (a) only directly to end users and (b) only to End Users physically located in the same LATA to be covered by this agreement? (Interconnection, §1.1)

MCI Position: No. ISP traffic is under the FCC's jurisdiction, and it never said its ISP recip compensation orders do not apply to FX traffic. FX/ISP provider customers do not have to be physically located in the LATA to be treated the same as voice traffic. The FCC has established a compensation regime for ISP traffic that does not require payment of access charges.

RLEC Position: For purposes of this agreement, yes. The physical location of the originating and terminating customer determines the jurisdiction of the call. This principle is consistent with the Commission's previous decisions in the US LEC and Adelphia Arbitration cases.

Issue #13: Should all intraLATA traffic be exchanged on a bill and keep basis or should reciprocal compensation apply when out of balance? (Interconnection, §2.4)

MCI Position: MCI believes reciprocal compensation rates should apply for ISP and non-ISP Local /EAS traffic if out of balance (60/40). MCI believes the recent Core ruling allows it to seek reciprocal compensation for ISP traffic in new markets.

RLEC Position: Compensation for IntraLATA Traffic should be in the form of the mutual exchange of services provided by the other Party with no per minute of use billing related to the exchange of such IntraLATA Traffic. From the beginning of negotiations, the RLECs proposed that there be no per minute of use billing for the exchange of IntraLATA Traffic under the agreement because MCI is a CLEC and can change business plans at any time in order to serve a certain sub-set of end users customers, and it can use regulatory arbitrage to its financial advantage. RLECs do not have this flexibility to choose certain customers, because they are carriers of last resort and have an obligation to provide basic local exchange service to all end user customers within their respective certificated service areas.

As background, the parties do not disagree over intercarrier compensation with regard to traffic that is not ISP-bound. For purposes of this proceeding MCI has agreed to treat all non-ISP-bound traffic, including all such traffic that is VoIP or otherwise IP-enabled, the same as other non-ISP telecommunications traffic; i.e., for such traffic, intercarrier compensation will be based on the physical location of the end points of the call. As stated in the contract language concerning issue #13, for such traffic deemed "local," "bill and keep" rather than reciprocal compensation shall govern, assuming the

traffic is not "out-of-balance."[13] If such "local" traffic is "out of balance," MCI proposes that reciprocal compensation be paid. For non-ISP-bound calls that, based on the end points of the call, are deemed to be intraLATA "toll" traffic, MCI has agreed to "bill and keep" rather than access charges, if, as proposed by MCI, traffic is not "out of balance." If intraLATA "toll" traffic is "out of balance," MCI would accede to access charges. MCI has also committed to provide required signaling parameters and to utilize separate local and toll trunk groups for the exchange of such traffic, thereby enabling the RLECs to accurately apply access charges to traffic. T. 124-25, 192.

This group of issues concerns ISP-bound traffic. For purposes of this proceeding, MCI will use "virtual NXX"[14] in a limited respect, i.e., only for users to make local calls to ISPs. MCI will not assign virtual NXX codes, as a result of this proceeding, to TWCIS customers. T. 151. MCI plans to interconnect at the RLECs' switches. MCI will then transport the call that originates with an RLECs' end user, to MCI's switch, using MCI's facilities. If the call is destined to be transmitted to an ISP, MCI will then send the call to the ISP's modem banks, using MCI's facilities. By using "virtual" NXX codes, MCI can provide ISPs with a number that is a "local" call to the end user, thus providing an alternative, particularly to those end users still using dial-up Internet service, to the use of

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[13] "Out of balance" traffic occurs when one party terminates more than 60% of total "local" traffic exchanged between the parties. See Appendix, issue #13.

[14] NXX codes are comprised of the fourth through the sixth digits of a ten digit telephone number. These codes are used to identify rate centers. "Virtual" NXX allows a customer to obtain a telephone number in a local calling area in which the customer is not physically located. As far as the person calling the number may be concerned, the call is local; however, the person answering the call is actually located physically somewhere else in the LATA. Virtual NXX is similar to "foreign exchange" ("FX"), although there are some technical differences between them. *In re: Petition of Adelphia Business Solutions of South Carolina, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Docket No. 2000-516-C, Order on Arbitration, Order No. 2001-045 (January 16, 2001), pp. 4-5 ("*Adelphia*"). ILECs also use virtual NXX codes. T. 346.

the RLECs' broadband and dial-up products. T. 159, 161, 276. This alternative is particularly important since CLECs, or their ISPs, cannot collocate their modem banks at the RLECs' central offices, but rather, typically must locate modem banks at locations outside the RLECs' territories. T. 265.

The FCC, in its *ISP Remand Order* assumed jurisdiction to determinate compensation between carriers for calls to ISPs. Specifically, the FCC describes such calls as "interstate access service." In its *ISP Remand Order*, the FCC rejected the analogy, upon which RLECs rely, of ISP-bound traffic to calls to pizza parlors, T. 41, 50, 210, because ISP-bound calls do not terminate locally. The FCC instead found that calls terminate (often numerous times during any given call) at the end points of the calls; i.e., not at an ISP's modem banks, but at servers that are interstate-located and, indeed, internationally-located. Thus the FCC concluded that ISP-bound traffic is "largely interstate." Such traffic is subject to compensation under 47 U.S.C. §251(g), rather than to reciprocal compensation for the termination of local calls under 47 U.S.C. §251(b)(5), and is not at all subject to the access charge regime. T. 282-83, 286-87, 299. The *ISP Remand Order* determined that at the rate would be $.0007 per minute; the *Core* order[15] removed the rate and volume caps for such traffic and made that rate permanent.

The RLECs agree that if the ISP's modem banks are *physically* located within the geographic area for which a call between the starting point of call and the modem would be considered "local," the carrier serving the ISP is entitled to compensation for the transport and termination of the call. Concomitantly, the RLECs also agree that pursuant

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[15] *In The Matter Of Petition Of Core Communications, Inc. For Forbearance Under 47 U.S.C. § 160(C) From Application Of The ISP Remand Order*, WC Docket No. 03-171, Order, DA 04-1764, 2004 WL 1403331 (F.C.C.), 19 F.C.C.R. 11,075, 19 FCC Rcd. 11,075 (rel. June 23, 2004) (hereinafter, the "Core" order.

to the *ISP Remand Order* the carrier whose customer originated the call is not entitled to originating access charges.

The dispute concerns what should occur when the modem banks are physically located outside the geographic area for which a call between two end points in that area would be considered "local." Such a call is unquestionably "interstate" under the FCC's analysis. For such calls, there is no difference in the interconnection arrangement, so far as the RLEC's facilities and MCI's interconnection with them are concerned; the point of interconnection (where the responsibility for costs is established) remains at the RLECs' central offices. Thus the RLECs assume no additional costs when the modem banks for MCI's customers are located outside the geographic "local" area. And just as when the modem banks are physically located in the same area as the caller, the customer who calls the ISP considers the call to be "local." In either event the caller is billed for a "local" call. T. 278-81.

In the RLECs' view, therefore, compensation to the carrier serving the ISP would be payable at the $.0007 rate only if the modem is physically located within the geographic scope of the "local" area. Notwithstanding the "interstate" nature of the call, a call to such a modem would not be treated as a long distance call and access charges would not apply. T. 288-89. If the modem, however, happens to be physically located outside the geographic "local" area of the caller, then, even with no change in the interconnection arrangement, the RLECs would deny compensation to the carrier serving the ISP, and instead demand access, at $.01 per minute (for intrastate access) or more (for interstate access). Payment of access to the RLECs effectively ensures their hold over